was estimated at approximately $42,000 (Pet. App. 3a). Corinth opposed the application and requested the Commission, under Section 7(a) of the Act, to order Tennessee Gas to sell the city the amount of gas it needed in excess of 3,850 Mcf per day (the quantity specified in its contract with petitioner) until February 1, 1970, and its total requirements of 6,550 Mcf per day thereafter (Pet. App. 3a). Corinth proposed to build 2.75 miles of 8⅝-inch pipeline to permit the necessary connection to its facilities (Pet. App. Supp. 105).[2] The cost to the city of the construction was estimated at about $100,000 and the saving in gas costs from the purchase of its full requirements from Tennessee Gas was estimated at about $100,000 annually (Pet. App. 3a).

On motion of petitioner the applications were consolidated (Pet. App. 3a). After hearings and briefing, the examiner in substance granted Corinth's application over the objections of petitioner and Tennessee Gas (J.A. 77–102). The Commission, with some modifications, concurred in that determination, denying petitioner's application and granting Corinth's (Pet. App. 3a; Pet. App. Supp. 119–120).[3] It found that

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[2] In 1951, when Corinth built its distribution system, petitioner's line was the nearest pipeline to it and Corinth had agreed to purchase gas from it under a long-term contract expiring February 1, 1970. At that time Tennessee Gas' nearest line was about 20 miles from Corinth. A few years later Tennessee Gas, from which petitioner buys its gas, built its Kinder-Portland line which passes about one mile from Corinth (J.A. 3–5, 9–10, 78).

[3] The Commission ordered Tennessee Gas, until February 1, 1970, to deliver to Corinth, for the account of petitioner, Corinth's requirement in excess of 5,300 Mcf per day (Pet. App. Supp. 119–120). That is the amount being supplied currently by petitioner to the city.

purchasing from Tennessee Gas would save Corinth $2,000,000 over a 20-year period and also that the detriment to petitioner and its other customers would not be serious. In this respect, it found specifically that the loss of sales to Corinth would be more than compensated for by normal growth in petitioner's sales to others.[4] In addition, the Commission found that the unamortized cost of petitioner's facilities serving Corinth would be about $40,000 by February 1, 1970, with 60 percent of that amount representing the meter stations that would still have salvage value, and that the balance would be amortizable over several years (Pet. App. Supp. 109–111; Pet. App. 3a–4a).

The court of appeals affirmed the Commission's decision. It agreed with the Commission that the replacement of petitioner by Tennessee Gas as Corinth's supplier constituted neither a revocation of petitioner's certificate nor an abrogation of petitioner's contract with Tennessee Gas for increased purchases. It pointed out that the certificate issued to petitioner had never insured that Corinth would continue to purchase gas from petitioner beyond the contract term or that petitioner would be protected from competition from other interstate pipelines. The court, as had the Commission, explained that Section 7(g) authorizes the grant of more than one certificate for one service area and that Section 7(e) directs

[4] Petitioner had estimated its 1970 volume, without sales to Corinth, at 15,204,400 Mcf as against an estimated 1966 volume, with sales to Corinth, of 12,914,200 Mcf. The 1970 peak-day wholesale sales without Corinth were estimated at 90,210, compared to an estimated peak of 89,710 in 1966, including Corinth (Pet. App. Supp. 108–109).

the grant to a qualified applicant. The Act's primary criterion for certification is the public interest which, the court concluded, the Commission had reasonably found would be served by substitution of the new supplier (Pet. App. 4a–5a, 7a–8a). The court below also found (Pet. App. 5a–7a) that the Commission's action was not inconsistent with the abandonment provisions of Section 7(b) of the Act. Finally, it concluded that the Commission had reasonably found that it was in the public interest to permit Corinth to reduce its gas costs substantially where there was no serious detriment to petitioner and its other customers (Pet. App. 8a–9a).

ARGUMENT

As the court below properly held, petitioner's claim that the Commission's action constitutes a revocation of its certificate rests on the frequently rejected view that natural gas pipeline certificates assure freedom from competition. Moreover, the alleged conflicts with other decisions are non-existent. Accordingly, no further review is warranted.

1. The Commission found that the public interest would be served by permitting the City of Corinth, which distributes natural gas locally, to buy its gas directly from Tennessee Gas rather than from petitioner (which buys from Tennessee Gas) starting in February 1970, when Corinth's long-term contract to purchase gas from petitioner expires. Petitioner, in making its basic challenge that this action of approving a substitute supplier violates its existing certificate, refuses to accept the well-established

principle that certificates of public convenience and necessity under the Natural Gas Act do not grant the holder an exclusive or perpetual right to provide a certificated service.

To the contrary, as the court below stated (Pet. App. 4a–5a), Section 7(g) of the Act unqualifiedly provides that "[n]othing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company." The courts have accordingly long recognized that this language contemplates competition for both existing and new markets, and permits the full or partial replacement of an existing supplier where the public interest is served by such a substitution. See, *e.g.*, *Cincinnati Gas & Electric Co.* v. *Federal Power Commission,* 389 F. 2d 272 (C.A. 6), certiorari denied, 393 U.S. 826; *Atlantic Seaboard Corp.* v. *Federal Power Commission,* 397 F. 2d 753 (C.A. 4); *Kentucky Natural Gas Corp.* v. *Federal Power Commission,* 159 F. 2d 215 (C.A. 6); see also *Home Gas Co.* v. *Federal Power Commission,* 231 F. 2d 253 (C.A. D.C.), certiorari denied, 352 U.S. 831; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881 (C.A.D.C.), certiorari denied, 335 U.S. 854. As the Fourth Circuit held in the *Atlantic Seaboard* case, rejecting the contention that a certificated supplier was entitled to continue service at its historic level even where no contractual obligation existed, the "Natural Gas Act does not expressly limit a second supplier to incremental sales,

and neither the commission nor the courts have imposed such a rigid exclusion. The Act's primary criterion for certification is the public interest" (397 F. 2d at 758–759).[5]

Thus, the Commission and the court below were plainly correct in rejecting petitioner's restrictive statutory construction which would reduce the Commission's ability to perform its statutory function in eliminating excess charges to some consumers resulting from a middleman that has become unnecessary, where the harm to other consumers, if any, was reasonably found to be minimal.

2. Petitioner's claim of a conflict with *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, and *American Trucking Associations, Inc.* v. *Frisco Transportation Co.*, 358 U.S. 133, is premised on the erroneous view that its certificate was revoked by not treating it as a perpetual grant to serve the City of Corinth free of competition from other natural gas pipelines.

The allegations of conflict with *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170, and *United Gas Pipe Line Co.* v. *Federal Power Commission*, 385 U.S. 83, are equally insubstantial. In *Sun Oil* the Court approved the Commission's view that the certificate there issued did not terminate by its own terms at the expiration of the underlying gas sales contract and that consequently the new rate under a substitute contract was properly viewed by the Commission as a

[5] There the Fourth Circuit properly rejected the claim, repeated here (Pet. 15), that this Court's dictum in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660, meant that competition could, as a matter of law, be only for new service.

rate change, subject to suspension, rather than as an initial rate not subject to suspension. But the fact that a seller of natural gas may not use the expiration of its contract as a basis for stopping an existing service unless a higher price is permitted to become effective without suspension provides no support for the present claim that the Commission, after examining all aspects of the public convenience and necessity, may not permit a substitution of supplier after termination of the contract period.

Reliance on *United Gas* is also misplaced. There the Court, in upholding the Commission's action, decided that a natural gas pipeline company could not cease purchasing gas without Commission authorization, where such a cessation involved the unilateral abandonment of some of its jurisdictional facilities and services. But, as this Court made clear (385 U.S. at 91), the purchaser could abandon its jurisdictional facilities and thus its supplier's service if the Commission gave consent after it had been given an opportunity to consider all pertinent public interest factors. The present case, though not involving an abandonment as petitioner claims, nevertheless did involve a full consideration of all pertinent public interest factors. Thus, the Commission not only took into account the substantially lower gas purchase costs for Corinth, but also found that the adverse effect of the substitution of another supplier on petitioner and its remaining customers would be negligible. The court below (Pet. App. 8a–10a) found this conclusion rationally based and supported by substantial evidence. These factual findings are not challenged here. Petitioner's

assertion (Pet. 13–14) that the Commission considered only the effect of the substitution on Corinth is thus incorrect.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1970.

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[6] For similar reasons, the alleged conflicts with *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F. 2d 204 (C.A.D.C.), certiorari denied *sub nom. Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 364 U.S. 913, and *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A.D.C.), are also non-existent.

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